

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

UNITED STATES OF AMERICA

v.

Case No. 8:03-CR-77-T-30TBM

HATEM NAJI FARIZ

**MOTION TO EXCLUDE COMPUTER AND INTERNET TESTIMONY,
NEW COMPUTER AND INTERNET EXHIBITS, AND NEW TRANSLATIONS
BASED ON DISCOVERY VIOLATIONS,
AND MEMORANDUM OF LAW IN SUPPORT**

Defendant, Hatem Naji Fariz, by and through undersigned counsel, and pursuant to the Fifth and Sixth Amendments to the U.S. Constitution and Federal Rule of Criminal Procedure 16(d)(2), respectfully requests that this Court preclude the admission of proposed government exhibits because of discovery violations resulting in substantial prejudice to Mr. Fariz. As grounds in support, Mr. Fariz states:

1. On June 23, 27, and 28, 2005, the government called Agents Margaret Fox and Keith Arndt to the stand, who testified, over the course of three days, to matters found on the computers seized in this case. The Court sustained some objections to the admission of items found in the temporary internet files of these computers, since, according to Agent Arndt's own testimony, items in the temporary internet files are placed there automatically by the computer.

2. On June 28, 2005, Mr. Fariz filed a motion in limine seeking to exclude exhibits of purported Palestinian Islamic Jihad websites that the government would seek to

introduce on the grounds of hearsay, authenticity, and confrontation. (Doc. 1233).¹ The Court agreed that the government had foundation problems with respect to the internet exhibits. The government therefore faced fundamental problems as to admissibility of internet exhibits. Rather than calling their internet experts to testify, the government indicated it would re-examine its internet exhibits and their foundation.

3. Subsequent to this argument, the government began producing to the defense, for the first time, new discovery and proposed exhibits of materials from internet companies, the internet, and the computer hard drives. Specifically:

a. Between late June 2005 and September 2005, the government has provided records subpoenaed from internet companies, including some records that have apparently been in the government's possession since May 2003 and October 2003, but were never provided to the defense.

b. Between September 1, 2005 and September 16, 2005, the government produced, for the first time to the defense well over 50 new items of discovery, marked as exhibits.²

c. Some of the new discovery/exhibits are documents in Arabic. Since late July 2005, the government has provided approximately 49 new translations of the

¹ Mr. Fariz also filed a pretrial motion in limine to exclude the admission of website evidence. (Doc. 980).

² This number may be understated, because this count does not include new discovery/exhibits from a computer seized at the residence of Ghassan Ballut.

internet/computer materials, 40 of these translations have been provided since September 1, 2005.³

4. The government apparently intends on re-calling its computer expert, Keith Arndt, and calling its internet expert, Russ Hayes, as early as Monday, September 19, 2005.

5. Despite taking two months to continue its preparation of its computer and internet testimony and exhibits, the government never provided to the defense a summary of the testimony of Russ Hayes, including a description of his opinions and bases of his opinions, *see* Fed. R. Crim. P. 16(a)(1)(G), until the afternoon of Friday, September 16, 2005. In this disclosure, the government also provided Russ Hayes' reports, calling them "3500 materials," which are dated from March 7, 2004 through August 22, 2005, and additional new exhibits and new translations. Significantly, of the new exhibits, the government provided for the first time a Power Point exhibit (Government Exh. 169) which outlines the anticipated testimony of Russ Hayes with respect to the government's proposed internet evidence.⁴

³ This number does include new translations of the exhibits taken from Ghassan Ballut's computer.

⁴ The undersigned has repeatedly inquired of the government when they intended on calling their internet expert and when the defense would have the new internet materials. The government indicated that they were meeting with their internet expert on September 9, 2005 to finalize the internet exhibits. The government provided to the defense its proposed internet exhibit translations on September 9, 2005, but then failed to provide his expert summary, reports, and additional exhibits until Friday, September 16, 2005. The government has not provided any new reports or summaries of Keith Arndt.

6. The government was required to produce its expert summaries by April 16, 2005, and its other Rule 16 disclosures by April 25, 2005. (Doc. 960 (Order setting Rule 16 deadline)).⁵ These new materials were provided to the defense months after the Rule 16 deadline, and worse, months into the trial, during the time that defense counsel have been preparing for other witnesses and other issues arising in trial.

7. Because of the technical nature of the government's proposed computer/internet materials, counsel for Mr. Fariz have been working with an internet expert, Dr. Robert DeYoung. Counsel for Mr. Fariz had reviewed the materials that the government had provided to the defense prior to trial with Dr. DeYoung and then prepared a motion in limine to exclude the materials.

8. Because of the lateness and volume of the government's disclosures leading up to its second attempt to admit the computer/internet materials, counsel for Mr. Fariz have been unable to consult meaningfully with the defense expert and to prepare complete legal arguments for exclusion and for effective cross-examination. According to Dr. DeYoung, he would need at least four to six weeks to complete his review of the new materials that the government has provided. Declaration of Robert DeYoung (attached as Exhibit A), ¶ 3. Dr. DeYoung is further of the opinion that the government has not provided sufficient detail to the defense, even at this late stage, for his review to be complete. *Id.* ¶ 4.

⁵ With respect to the new discovery/exhibits, the government has also violated this Court's deadline of June 6, 2005 to provide to the Court and the parties their list of exhibits.

9. Because of the lateness of the materials, Mr. Fariz requests that the testimony and proposed exhibits be excluded.

10. The government was required to provide to the defense its translations by June 3, 2005. (Doc. 1138). The government has exceeded this deadline by nearly three months with the production of close to 50 new translations. Mr. Fariz conservatively estimates that at least 110 to 120 hours of additional translation time will be required for Mr. Fariz to prepare counter-translations before cross-examination. Allowing the admission of these new translations – which would require the government to call three of its translators back to the stand, namely Camille Ghorra, Tahsin Ali, and Marwan Khalil – would require an approximately three week-delay in trial. Because of the substantial prejudice to the defense of the late production of these new translations, Mr. Fariz respectfully requests that the Court exclude any new translations produced by the government after June 3, 2005.⁶

⁶ There are a number of other grounds for denying the admissibility of the government's proposed computer/internet exhibits, including other arguments for the substantial prejudice of the late disclosure and evidentiary arguments. Because of the limited amount of time since receiving the government's most recent materials, this motion only addresses the substantial prejudice of the late discovery. The other grounds will be addressed in Court.

MEMORANDUM OF LAW

I. The Court Should Exclude the Government's Proposed Computer and Internet Testimony, Computer and Internet Exhibits, and New Translations

A. Rule 16 Violation

1. The Required Disclosures Under Rule 16 are Designed to Ensure the Defendant is Provided a Fair Trial

The Magistrate Judge set a Rule 16 deadline of April 16, 2005 for its expert summaries and April 25, 2005 for its remaining Rule 16 disclosures. (Doc. 960).⁷ Rule 16 requires the government to provide, *inter alia*: (1) the defendant's statements, (2) documents and objects material to preparing the defense, (3) documents and objects of the defendant, and (4) documents and objects that the government intends to use in its case-in-chief. Fed. R. Crim. P. 16(a)(1)(A), (B) and (E). Rule 16's mandatory discovery provisions were designed to promote "the fair and efficient administration of criminal justice by providing the defendant with enough information to make an informed decision as to plea; by minimizing the undesirable effect of surprise at the trial; and by otherwise contributing to an accurate determination of the issue of guilt or innocence." Fed. R. Crim. P. 16 advisory committee note. As the Eleventh Circuit has indicated, "the purpose of Rule 16(a) is 'to protect the defendant's rights to a fair trial.'" *United States v. Noe*, 821 F.2d 604, 607 (11th Cir. 1987) (quoting *United States v. Rodriguez*, 799 F.2d 649, 654 (11th Cir. 1986) (per

⁷ The Magistrate Judge set this Rule 16 deadline after Mr. Fariz complained about the delayed production of the government's Rule 16 disclosures, including its expert summaries. See Doc. 954.

curiam)). Because the “purpose of rule 16 is to protect a defendant’s right to a fair trial rather than to punish the government’s non-compliance,” “[i]nadvertance does not render a discovery violation harmless.” *United States v. Camargo-Vergara*, 57 F.3d 993, 999 (11th Cir. 1995).

Rule 16 specifically requires notice of expert testimony, so that the defense is provided sufficient time to review and prepare to address the government’s proposed expert testimony. Because of the voluminous and technical nature of the government’s proposed expert testimony and exhibits, sufficient time to review the materials is especially important. *United States v. Robinson*, 44 F. Supp. 2d 1345, 1347 (N.D. Ga. 1997) (“If a defendant does not have the bases for the government’s opinion, there is no way the defendant’s counsel can effectively cross-examine the expert. It is this issue, which goes to the fairness of the trial, that the court must always keep in mind in dealing with discovery issues in criminal cases.”).

2. Because of the Lateness of the Government’s Disclosures During Trial, the Court Should Exclude the Government’s Proposed Testimony and Exhibits

The Court’s Rule 16 deadline was designed precisely to avoid the situation presented now: the production of materials too late for the defense to be able to prepare effectively in the absence of disrupting and delaying the trial. As expressed in the Declaration of Robert DeYoung, the defense expert would require at least four to six weeks to review the materials and convey his findings to counsel for Mr. Fariz. In the absence of this review, counsel for Mr. Fariz are simply not prepared to provide complete legal arguments as to the admissibility

(or lack thereof) of the government's proposed testimony and exhibits or to be prepared for effective cross-examination.⁸

B. The Court Should Exclude Translations Produced by the Government Months Into the Trial

In prior motions, Mr. Fariz detailed for the Court the difficulties that the defense faced in the translation process. *See, e.g.*, Doc. 1096. Of particular relevance to the instant motion, counsel for Mr. Fariz expressed concerns about the government's continued production of translations after the government's February 18, 2005 deadline and about the ability of Mr. Fariz to be prepared for trial. *Id.* In response to Mr. Fariz's arguments, the Magistrate Judge wrote:

One aspect of Mr. Fariz's argument deserves additional attention. In particular, Mr. Fariz points to the flurry of recent discovery production by the Government and its continued production of additional foreign-language translations/transcripts. He contends that part of the delay in producing counter-translations/transcripts was caused by the Government's serving revised translations/transcripts of previously provided material and wholly new translations/transcripts even after the February 18, 2005, deadline for such production by the Government. To the extent that the Government has produced wholly new translations/transcripts (not revisions of earlier transcripts) after the February 18, 2005, cutoff, those translations/transcripts are untimely and deserve the same treatment. Accordingly, to the extent the

⁸ What counsel are prepared to argue, at this stage, is that information obtained from websites is fundamentally inadmissible because of authenticity, hearsay, and the confrontation rights of Mr. Fariz. Mr. Fariz renews his previous motions in limine with respect to internet evidence (Docs. 980, 1233) and would add the recent decision of *Glynn v. Bankers Life & Casualty Co.*, No. 3:02CV1802, 2005 WL 2028698, *3 (D. Conn. Aug. 23, 2005), wherein the district court struck references to websites from a civil summary judgment motion because they "constitute inadmissible hearsay." If a district court will not even accept website evidence in a civil case cited in a summary judgment motion, then a court presented with such website evidence in a criminal case at trial should also reject its use.

Government has served upon the Defendants new translations/transcripts of foreign-language matters after its deadline of February 18, 2005, these translations/transcripts should also be excluded at trial absent a contrary order of the trial judge.

(Doc. 1108 at 4-5).

In response to arguments by counsel for Dr. Al-Arian and for the government, the Court set a final deadline of June 3, 2005. (Doc. 1138). No further extensions have been sought.

Mr. Fariz would respectfully request that the Court exclude the government's new translations, produced nearly three months after the deadline. Should the Court allow the government to present its new translations, Mr. Fariz would request a continuance or recess of the translators' testimony for at least three weeks to allow the preparation of counter-translations and for cross-examination. Mr. Fariz would note that these new exhibits will require the government to put on, again, three of its translators Marwan Khalil, Tahsin Ali, and Camille Ghorra, who should be subject to cross-examination concerning the accuracy of their translations.

III. Conclusion

Based on the foregoing, Defendant, Hatem Naji Fariz, respectfully requests that this Court preclude the admission of proposed government computer/internet testimony, exhibits, and translations because of discovery violations resulting in substantial prejudice to Mr. Fariz. Should the Court not preclude this testimony and evidence, counsel for Mr. Fariz would request at least a four to six week continuance to prepare to meet this evidence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of September, 2005, a true and correct copy of the foregoing has been furnished by CM/ECF and hand delivery, to Walter Furr, Assistant United States Attorney; Terry Zitek, Assistant United States Attorney; Cherie L. Krigsman, Trial Attorney, U.S. Department of Justice; Alexis L. Collins, Trial Attorney, U.S. Department of Justice; William Moffitt and Linda Moreno, counsel for Sami Amin Al-Arian; Bruce Howie, counsel for Ghassan Ballut; and to Stephen N. Bernstein, counsel for Sameeh Hammoudeh.

/s/ M. Allison Guagliardo
M. Allison Guagliardo
Assistant Federal Public Defender